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In the Supreme Court of the United States

OCTOBER TERM, 1966.

Case No. _____.

ARTHUR FORD,

Appellee,

vs.

ROGER HAENDIGES, *et al.*,

Appellant.

On Appeal From
The Supreme Court of the State of Ohio.

JURISDICTIONAL STATEMENT.

The appellant appeals from the judgment of the Supreme Court of the State of Ohio entered on the 27th day of June, 1966 reversing the Eighth District Court of Appeals for the State of Ohio, and affirming a Summary Judgment rendered by the Trial Court of Cuyahoga County, Ohio, upon a Sister State's judgment. This statement is submitted in support of the contention that the Supreme Court of the United States has jurisdiction of the appeal, and that a substantial question is presented for determination.

OPINION BELOW.

The opinion of the Supreme Court of the State of Ohio is reported in 7 O. S. 2d 13. Copies of the opinion and judgment are attached hereto as Appendix A.

JURISDICTION.

The proceeding here sought to be reviewed arose from a judgment rendered by an Illinois Court against an Ohio resident and citizen. Thereafter the Illinois judgment was sued upon in the Ohio Court, issue was taken and judgment was thereupon rendered summarily by the Ohio Court against the appellant.

The Village Court of Maywood, County of Cook, State of Illinois, rendered judgment on September 7, 1963 against the appellant. On November 6, 1963 a petition was filed against the appellant in the Ohio Court of Common Pleas for the County of Cuyahoga. Summary Judgment was rendered by the Cuyahoga County Court of Common Pleas on December 18, 1964. The Eighth District Court of Appeals for Ohio did, on the 26th day of July, 1965, enter an order reversing the judgment of the Trial Court and remanding the case for trial.

On August 10, 1965 the appellee filed his Notice of Appeal to the Supreme Court of Ohio, and on June 27, 1966, the Supreme Court reversed the Appellate Court and reinstated the judgment of the Trial Court. An Application for Rehearing filed by the appellant was denied on September 28, 1966, and Notice of Appeal to this Court was filed in the Supreme Court of Ohio on October 3, 1966.

The jurisdiction to entertain appeal in this Court for Review is found in the following decisions:

Dahnke-Walker Milling Company vs. Boundurant, 257 U. S. 282;

Largent vs. Texas, 318 U. S. 418;

Lawrence vs. State Tax Commission, 286 U. S. 276.

Also and by reason of the fact that the validity of the Illinois Statute upon which both the Illinois and Ohio judgments were predicated was specifically challenged in

the Trial Court as to its validity and entitlement to Full Faith and Credit, the following decision is here offered as additional support to the effect that this Court has jurisdiction to review the questions herein presented on appeal:

Hanson vs. Dencla, 357 U. S. 235.

QUESTIONS PRESENTED.

1. Is the Illinois law, as set forth in the Illinois Revised Statutes, Chapter 110, Section 16, wherein it is provided that personal service of summons may be made upon any party outside of the State, effective so as to grant, in personam jurisdiction to that Illinois Court issuing summons pursuant to said section, and causing said summons to be served upon a named defendant in the State of Ohio.

2. When an Illinois Court adjudicates, by default, the rights of an Ohio resident, claiming jurisdiction therein upon the allegations of service of summons effected upon the defendant in Ohio, and thereafter said Illinois judgment is prosecuted and sued upon in Ohio, is the recognition of that Illinois judgment resulting in a judgment against the defendant by the Courts of Ohio, a denial of due process of law, and in violation of the provisions of the 14th Amendment, Section 1 of the Constitution of the United States.

3. When an in personam money judgment is rendered by default against an Ohio resident by an Illinois Court, which Court claims personal jurisdiction over the Ohio resident after causing him to be served with summons in Ohio, is that Illinois judgment entitled to Full Faith and Credit in Ohio under the provisions of Article IV, Section 1 of the Constitution of the United States.

4. May a reviewing Court infer the existence of a Bill of Exceptions presumed to contain undefined evidence

supposedly presented previously to and received by a Trial Court in a hearing on a Motion for Summary Judgment under the provisions of O. R. C. 2311.041, and by reason of such disputed Bill's absence from the record, upon review, affirm the Trial Court's judgment against the appellant, thereby effecting a denial of due process, in violation of the provisions of the United States Constitution, Amendment XIV, Section 1.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

United States Constitution, Article IV Section 1.

United States Constitution, 14th Amendment.

State of Ohio Constitution, Article I Section 16.

Illinois Revised Statutes, Chapter 110 Sections 16 and 17.

Ohio Revised Code Section 2311.01.

Ohio Revised Code Section 2311.041.

The above Constitutional Provisions and Statutes are all set forth in Appendix B attached hereto.

STATEMENT OF THE CASE.

The plaintiff-appellee, Arthur Ford, operated a retail sales business in the City of Chicago, Illinois while the defendant-appellant, Ideal Aluminum, Inc., conducted a manufacturing business in Cleveland, Ohio. The co-defendant, Roger Haendiges, was an officer and employee of Ideal Aluminum, Inc., an Ohio corporation. During the course of time, the plaintiff-appellee became aware of the appellant's product, and arranged, in Cleveland, for the sale of certain merchandise to be made to him and delivered in Chicago, on a limited credit extension.

Following this transaction, the plaintiff ordered merchandise from the appellant, and requested that it be

shipped to his place of business in Chicago. Upon receipt of the order, the appellant did ship to the plaintiff, but payments therefor became slow, and the account was caused to become in arrears.

After several requests for payment were made by telephone and letter to the plaintiff, he did promise to commence regular payments upon his account, and it was understood that no further credit was to be extended to him until such time as his balance was paid in full. Additional shipments of merchandise were to be on a C. O. D. basis.

Pursuant to the foregoing arrangements, the plaintiff did place an order with the appellant for Two Thousand Two Hundred and Ninety-Five Dollars and Ninety Cents ($2,295.90) worth of merchandise. In confirming the order, the appellant reminded the plaintiff that shipment would be made on a C. O. D. basis only, to which the plaintiff readily consented.

On October 20, 1962, the merchandise arrived at the appellee's place of business and the plaintiff issued his check therefor in the sum of Two Thousand Two Hundred Ninety-Five Dollars and Ninety Cents ($2,295.90).

Following arrival of the aforesaid check in Cleveland, Ohio, it was presented for payment only to be returned thereafter, payment upon it having been stopped by the plaintiff-appellee.

All attempted communication with the plaintiff failed. He refused to answer telephone calls, telegrams or letters, nor did he return or offer to return the merchandise previously delivered or any part thereof. An investigative agency in Chicago reported that the plaintiff had recently closed his place of business, having sold out most of his stock at exceedingly low prices until creditors in Chicago attached the remaining and unsold portions of his assets.

Complaint was made upon the check to the Illinois authorities who, after investigation, required an officer of the defendant-corporation to appear in the Illinois Court and produce the subject check. In compliance with such request, the officer, Roger Haendiges, did appear and a warrant was thereupon issued against the plaintiff charging him with a criminal act. At the time set for the preliminary hearing and examination, the plaintiff did indicate to the Court that he would have the check paid and fully honored within a few days, and did, in open Court, and in a most contrite manner, apologize and appeal to the Court for continuance so that he may then obtain the funds with which to pay his obligation to the defendant-corporation. After conferring with the Court, and the Prosecutors, and upon the Court's recommendation, and the plaintiff's solemn word, it was agreed that the matter would be continued to a later date for the purpose of effecting payment and thereupon the complaint would be dismissed.

Shortly before the date set for hearing, the Prosecutor's Office called the defendant-corporation's office in Cleveland, and stated that its file would be complete if the defendant-corporation would send an authorized person to acquiesce in the dismissal, formally, and receive the money to be paid by the plaintiff-appellee. In compliance with this request, an officer was again sent, only to learn that the action had already been dismissed, and immediately thereafter the plaintiff had a change of heart and refused to then pay the amount due.

Following said dismissal, the plaintiff then made demand upon the defendant-corporation for damages, and stated that he would not honor the aforesaid check since the action was now dismissed. The plaintiff then commenced a lawsuit against the defendants in the Village

Court of Maywood, Illinois, and attempted to serve the defendants in Ohio by appointing, under Illinois law, a person in Ohio, receiving his jurisdiction by mail from Illinois, and so as to serve the defendants in Ohio with Illinois process.

Thereafter, judgment was rendered by the Village Court of Maywood against the appellant, although no appearance by nor admission of jurisdiction over the defendant-appellant was made, nor was the defendant, Roger Haendiges, ever served with process in Ohio or elsewhere.

Suit upon the foreign judgment was commenced in Cuyahoga County Court of Common Pleas with which issue was taken by answer, denying every salient point asserted, and specifically denying the foreign Court's jurisdiction, together with the validity of its judgment. Thereafter, and while the case was at issue, the plaintiff-appellee moved for and was awarded Summary Judgment from which appeal was taken.

At the time of the hearing on the plaintiff-appellee's Motion for Summary Judgment, there were brief oral arguments setting forth the issues with concentration upon the matter of jurisdiction relating to the foreign judgment. *The Court then, without the taking, presentation or receipt of any evidence, affidavit or deposition, requested that briefs of law be submitted and thereupon adjourned the hearing.* Briefs of law and argument were thereafter submitted; the Motion was, with said briefs alone, taken under advisement, and a decision thereupon rendered from which appeal was taken.

The Eighth District Court of Appeals reversed the Trial Court's decision and remanded the case back for trial upon the issues joined.

Thereafter, the plaintiff-appellee appealed to the Supreme Court of the State of Ohio which did, after a

hearing upon the merits of the appeal, reverse the Eighth District Court of Appeals and affirm the judgment of the Trial Court ordering said judgment into execution, and from which this appeal was taken.

THE QUESTIONS ARE SUBSTANTIAL.

The issues involved in this appeal relate directly to the guaranty of due process accorded citizens of the various States. The recent developments of law have reflected the tendency of individual jurisdictions to enlarge upon the concept of that territory over which they administrate. This is accomplished by extending their ability to adjudicate the rights of persons residing beyond geographic borders which heretofore firmly limited the Court's jurisdiction.

Such laws, known as Long Arm Statutes, are fairly common throughout the United States, and appear to be the maturity to which the embryo of *Pennoyer vs. Neff*, 95 U. S. 714; 24 L. Ed. 565 has grown. In the early *Pennoyer vs. Neff* case, the Court stated:

> "The several states of the union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the Government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory * * * the other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory * * * the several States

> are of equal dignity and authority, and the independence of one implies the exclusion of power from all others * * *.
>
> Since the adoption of the 14th Amendment to the Federal Constitution, the validity of such judgments rendered against non-residents without personal service of process upon them, or their voluntary appearance, may be directly questioned, and their enforcement in the State resisted on the ground that proceedings in a Court of justice to determine the personal rights and obligations of parties over whom that Court has no jurisdiction do not constitute due process of law * * *."

The question of whether a Court may invoke in personam jurisdiction was always tested upon the strength of its ability to (1) give notice of suit to a defendant, (2) compel his attendance at Court, and (3) compliance with its orders.

With the increase in population, communication and travel, it then became necessary to effect some means of securing a type of In Personam jurisdiction upon that defendant who would merely pass through the jurisdiction, never to return again, such jurisdiction to last somewhat longer than the visiting defendant's brief stay, and so as to afford some remedy to those citizens or others whom the visiting defendant might injure in his travel through the jurisdiction.

The doctrine of implied consent was thereupon used to create an agency relationship sufficient to satisfy the requirements of personal service, and thereby obtain In Personam jurisdiction. In short, the Long Arm Statutes provided that in exchange for some privilege which the State granted a foreign defendant, that defendant did then, by accepting the privilege, consent to the appointment of a State officer as his agent for service of process. The

Court stated in *Doherty vs. Goodman*, 294 U. S. 623; 55 S. Ct. 553; 79 L. Ed. 1097:

> "The power of the States to impose terms upon non-residents, as to activities within their borders, recently has been much discussed. *Hess vs. Pawloski* 274 U. S. 352, *Wuchter vs. Pizzutti*, 276 U. S. 13, *Young vs. Masci*, 289 U. S. 253. Under these opinions it is established doctrine that a State may rightly direct that non-residents who operate automobiles on her highways shall be deemed to have appointed the Secretary of State as agent to accept service of process, provided there is some provision making it reasonably probable that notice of service on the Secretary will be communicated to the non-resident defendant who is sued."

Many cases following have upheld the principle of law established in the *Doherty* case, and have further had the doctrine of MINIMUM CONTACTS validate judgments rendered by the Court of one State against residents of another. Nevertheless, in each of those matters where the judgment was sustained, personal service was had upon an agent of the defendant within the territorial jurisdiction of the Court, such agent appointed by the defendant either directly or impliedly for the sole purpose of receiving such service of summons, and making that defendant amenable to in personam jurisdiction.

The Illinois Statute upon which the judgment herein appealed was rendered, does not provide for service to be made upon either the defendant nor his agent within the territorial jurisdiction of the Court. Rather, the Statute (Illinois Revised Statute Chapter 110 Section 17) provides that the service of summons "may be made by personally serving the summons upon the defendant outside this State * * * with the same force and effect as though summons had been personally served within this State."

Clearly there is a recognizable trend toward making transient visitors amenable to process even after their visit has expired; but the extremities to which *Pennoyer v. Neff* have been tailored in support of In Personam jurisdiction under the Long Arm Statutes and Sufficient Minimum Contacts doctrine can hardly be distended so as to also include the alleged commission of a Tortious Act. To do otherwise would create a situation whereby the reality of jurisdiction becomes speculative and conditioned upon determinations which relate directly to the merits of the case. The anomaly of a Court assuming jurisdiction under the alleged Tortious Act Theory could well wreak havoc with the principles of Res Judicata and Estoppel by Judgment.

Pennoyer v. Neff must either reject the alleged Tortious Act Theory, or the law must now reject *Pennoyer vs. Neff*.

The instant matter now offered to this Court for review incorporates within it the doctrine of *Pennoyer vs. Neff* and the extensions logically contemplated and contained within the frame work of its judicial foresight. The Illinois Statute (Chapter 110 Section 17) however uses the *Pennoyer* case as a frontier from which an attack upon Due Process is launched under the guise of protection for its citizens from invasion by foreign residents. Surely some pronouncement should now be made to all who venture beyond the border of their residence relative to the present understanding of Due Process insofar as it affects the competency of and manner in which a Court may adjudicate the rights of that traveler.

In the present case sought to be reviewed, the mere allegation of tortious conduct was sufficient to invest an Illinois Court with In Personam jurisdiction over an Ohio resident and permit the rendition of judgment against him

by default. If such proposition is to be accepted, then certainly Due Process would demand that when the Illinois judgment is executed in Ohio, the defendant be given an opportunity, in the Ohio Court, to establish that such judgment is not entitled to Full Faith and Credit in that the jurisdiction of the Illinois Court was defective. The minimum requirements of justice would demand that the defendant be then permitted to show (1) that he did not commit a tortious act, and (2) that he was not served with summons nor given notice of suit pursuant to Illinois law.

An action upon the Illinois judgment in the Ohio Court to which answer was taken raised, at the very outset, Constitutional issues requiring judicial determination by trial. Nevertheless, and without Due Process, the Trial Court summarily and without trial or evidence ruled on the validity of the Illinois Statute; the validity of the Illinois judgment; the fact of service upon the defendant, and the entitlement of such Illinois procedure to Full Faith and Credit in Ohio. In essence, the defendant was deprived of his day in Court.

Upon the plaintiff's Motion for Summary Judgment, the Trial Court disposed of all issuable matters contrary to the intendment and authority of Ohio Revised Code Section 2311.01.

A Motion for Summary Judgment is specifically limited to a resolution of that which is then before the Court in the forms contemplated by Statute, that is pleadings, depositions, answers to interrogatories, admissions of the genuineness of papers or documents, and affidavits, if any.

An examination of the record clearly reveals the unalterable fact that the documents before the Trial Court were reflective, not acknowledgments, of factual issues that had yet to be determined.

No witnesses were called nor testimony or other evidence presented or received in any form or manner whatsoever.

No trial upon any issue was ever had.

It is the defendant-appellant's contention that the Trial Court erred in rendering judgment upon the plaintiff's motion without inquiry into and determination of the facts upon which the cause was asserted and opposed by answer, and that such manner of judicial pronouncement resulted in a denial of Due Process.

The Supreme Court of Ohio further compounded the error when they recognized that judgment and ordered it into execution, reversing the Appellate Court and giving as their reason,

> "In the circumstances, it may be assumed that the evidence admitted by the Trial Court was competent, and that such evidence influenced the judgment rendered * * *.
>
> That where an authenticated Bill of Exceptions in a Trial Court is necessary to exemplify the facts which determine the issues there, its absence requires a reviewing court, on appeal, to dismiss the appeal or affirm the judgment of the Court in which the appeal is taken * * *."

Such reasoning completely ignores the fact that all of the evidence considered by the Trial Court was before the Appellate and Supreme Courts. The evidence of which they spoke consisted solely of the pleadings and exhibits attached to them. The Bill of Exceptions was absent from the record because it did not exist. The Trial Court rendered judgment upon what it regarded as matters of law reflected in the pleadings and documents before it, not upon matters of fact in issue and resolved by trial.

There was no trial of fact.

Assumption of fact indulged by a Court charged with a duty to judicially determine is a denial of Due Process.

It is therefore submitted that the questions presented in this appeal are substantial and of public importance.

Respectfully submitted,

LEONARD P. GILBERT,

Counsel for Appellant.

APPENDIX A.

OPINION OF THE SUPREME COURT OF OHIO.

(No. 39797—Decided June 22, 1966.)

Appeal—No bill of exceptions—Reviewing court must dismiss or affirm, when—Bill of exceptions necessary to determine issue presented.

Where an authenticated bill of exceptions in a trial court is necessary to exemplify the facts which determined the issues presented there, its absence requires a reviewing court on appeal to dismiss the appeal or affirm the judgment of the court from which the appeal is taken.

APPEAL from the Court of Appeals for Cuyahoga County.

This action was begun in the Court of Common Pleas of Cuyahoga County by Arthur Ford against Ideal Aluminum, Inc., an Ohio corporation, and Roger Haendiges, an individual, to recover from them the sum of $9,500 representing the amount of a summary judgment obtained by him against the defendants in the Village Court of Maywood, Cook County, Illinois, an alleged court of record in that state under Sections 23M and 333, Chapter 37 of the Revised Statutes of Illinois. Those sections are quoted in the petition herein.

It is asserted further in the petition that such Illinois judgment was rendered on September 7, 1963, and was based on a complaint filed by plaintiff against defendants for the commission by them of a tortious act against him in the state of Illinois; and that the Village Court of Maywood had jurisdiction of the subject matter and of the persons of the defendants by virtue of Section 17, Chapter 110 of the Illinois Revised Statutes, reading as follows:

> "(1) Any person, whether or not a citizen or resident of this state, who in person or through an

agent does any of the acts hereinafter enumerated, thereby submits said person, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

"(b) The commission of a tortious act within this state;

"* * *

"(2) Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the summons upon the defendant outside this state, as provided in this act, with the same force and effect as though summons had been personally served within this state."

Additional allegations of the petition are that in the Illinois action personal service of summons was obtained upon both the defendants herein in the city of Cleveland, Ohio, on July 11, 1963, and that the Illinois money judgment against defendants that no part thereof has been paid.

A joint answer was filed by the defendants in which all the material allegations of the petition are denied in detail.

Thereafter, Ford filed his motion in the Court of Common Pleas for summary judgment against both defendants on the ground that there is "no genuine issue as to any material fact, and that this party [Ford] is entitled to judgment as a matter of law."

In support of the motion, as shown by the record in this court, the following documents and papers were presented to the Court of Common Pleas:

1. One certified copy of the journal entry of the Village Court of Maywood in the case of Arthur Ford, Plain-

tiff, vs. Ideal Aluminum Company, aka Ideal Aluminum, Inc., and Roger Haendiges, Defendants, dated September 7, 1963, under case No. 63L-34, signed by Robert E. McAuliffe, Judge of the Circuit Court of Cook County Illinois, and former Judge of the Village Court of Maywood, attached.

2. One certified copy of the summons and return of summons with petition and exhibits attached in the case of Arthur Ford vs. Ideal Aluminum Company, aka Ideal Aluminum, Inc., and Roger Haendiges in the Village Court of Maywood Illinois, in case No. 63L-34, showing personal service of summons upon defendants in Cleveland, Ohio on July 11, 1963.

3. Photocopies of Illinois Civil Practice Act Chapter 110, Sections 16 and 17, showing the Illinois statutes under which personal service was obtained in the city of Cleveland, Ohio, subjecting defendants to the jurisdiction of the Illinois courts, specifically the Village Court of Maywood, the original books of said statute to be submitted at the time of trial.

4. The complaint against plaintiff alleging theft, filed in the Municipal Court of Chicago.

In the documents above enumerated, it appears that the defendant herein Haendiges, an officer of the Ideal Aluminum Company, signed, swore to and filed in Chicago and in the Municipal Court of that city a complaint charging that Ford on October 20, 1962, in the city of Chicago, committed the offense of theft in violation of Section 16-1 b, Chapter 38 of the Illinois Revised Statutes, 1961, "in that he knowingly obtained by deception control over $2,295.90 the property of the Ideal Aluminum, Incorporated, intending to deprive the said Ideal Aluminum, Incorporated, permanently of the use and benefit of said property."

It appears further from the record that, at the hearing on such complaint, Ford was exonerated and discharged from custody, and his bail bond ordered cancelled. By reason of his alleged wrongful, unjustified and malicious prosecution, Ford claimed to have incurred expenses of $2,250 for securing his bail bond and for attorney fees and to have been materially damaged in his standing and reputation.

A summary judgment in Ford's favor was rendered by the Court of Common Pleas by the following journal entry:

> "This cause came on for hearing on the motion of plaintiff for summary judgment in his favor. Upon consideration of the pleadings, exhibits, *evidence*, briefs and oral argument, the court finds that there is no genuine issue as to any material fact in the case, and the plaintiff is entitled to judgment as a matter of law. Wherefore, it is hereby ordered, and adjudged that plaintiff recover judgment against the defendants in the sum of nine thousand, five hundred dollars ($9,500), with interest at 6% from the date of the original judgment, September 4 [*sic*], 1963, and costs of suit hereon." (Emphasis supplied.)

Thereupon, Haendiges perfected an appeal on questions of law to the Court of Appeals. Upon hearing, that court reversed the judgment below, and its judgment entry reads in part:

> "It is therefore ordered, adjudged and decreed that the judgment of the Cuyahoga County Court of Common Pleas be, and the same is hereby reversed, as contrary to law and the cause is hereby remanded with instructions to overrule the motion for summary judgment for the reason that there is presented no bill of exceptions and it appears on the face of the record that there are issues of fact remaining for trial."

The cause is now in this court for disposition on an appeal as of right and the allowance of the motion to require the Court of Appeals to certify the record.

Messrs. Stewart & DeChant and *Mr. Thomas H. DeChant*, for appellant.

Messrs. Cozza & Steuer and *Mr. C. Anthony Stavole*, for appellee.

ZIMMERMAN, J. There was no bill of exceptions before the Court of Appeals, and the judgment entry of the Court of Common Pleas indicates that there was evidence introduced in and considered by that court. What that evidence may have been, its nature, form, significance and importance, and what admissions, concessions or other incidents may have occurred there are not shown. In the circumstances, it may be assumed that the evidence admitted by the trial court was competent, and that such evidence influenced the judgment rendered. A judgment pronounced by a court of record of general jurisdiction, regular on its face, carries with it the presumption of validity. 31 *Ohio Jurisprudence* 2d 687, Section 237.

This court has held on a number of occasions that, where an authenticated bill of exceptions in a trial court is necessary to exemplify the facts which determined the issues presented there, its absence requires a reviewing court on appeal to dismiss the appeal or affirm the judgment of the court from _____ St. 359, 116 N. E. 2d 430; *State, ex rel. Heights Jewish Center, v. Haake*, 165 Ohio St. 547, 138 N. E. 2d 401; *State, ex rel. Cliffview Land Co., v. Maloney, Commr.*, 166 Ohio St. 45, 139 N. E. 2d 40; and *State, ex rel. Community Improvement Corp., v. City of Independence*, 6 Ohio St. 2d 70, ____ N. E. 2d _____.

Such rule is applicable to summary-judgment proceedings. *Smith v. Diamond Milk Products, Inc.*, 176 Ohio St. 143, 198 N. E. 2d 72.

In the present case, since it had no bill of exceptions to consider and since a bill was necessary to determine the validity of the judgment of the Court of Common Pleas, the Court of Appeals on the record before it should have dismissed the appeal or affirmed the judgment below. Therefore, the judgment of the Court of Appeals is reversed, and the cause is remanded to that court for further proceedings not inconsistent with this opinion.

Judgment reversed.

MATTHIAS, O'NEILL and SCHNEIDER, JJ., concur.
HERBERT, J., concurs in the judgment.
TAFT, C. J., and BROWN, J., dissent.

HERBERT, J. I concur in the judgment but am unable to concur in the syllabus for the reasons stated in my dissenting opinion in *Wickham v. First Federal Savings & Loan Co.*, 177 Ohio St. 170.

TAFT, C. J., dissenting. As we held unanimously in *Kindle v. Akron* (1959), 169 Ohio St. 373, 159 N. E. 2d 764, a judgment for plaintiff will be reversed where the petition does not state a cause of action, even though there is no bill of exceptions.

In the instant case, the petition purports to state a cause of action based upon an Illinois "judgment * * * rendered upon a complaint * * * for the commission of a tortious act within * * * Illinois." There is nothing in the petition to indicate what that tortious act was except the statement in the attached copy of the judgment "that malice is the gist of this action." The petition alleges "that personal service was obtained upon both defendants * * * in Ohio," and alleges no other basis for jurisdiction of the Illinois court to render the judgment sued on. The petition

alleges and plaintiff relies upon an Illinois statute providing:

> "(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:
>
> "(a) The transaction of any business within this state.
>
> "(b) The commission of a tortious act within this state.
>
> "(2) Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the summons upon the defendant outside this state, as provided in this act, with the same force and effect as though summons had been personally served within this state."

There is no allegation that defendant transacted any business in Illinois.

It is stated in 30 *American Jurisprudence* 329, Section 265:

> "It is a general rule of constitutional law that no judgment in personam can, consistently with due process, be rendered against a nonresident without personal service of process upon him within the territorial jurisdiction of the court in which the suit is brought, and that a judgment rendered without such service of process is not entitled to recognition in the courts of other states under the full faith and credit clause." See *Armstrong v. Armstrong* (1954), 162 Ohio St. 406, 123 N. E. 2d 267, affirmed (1956), 350 U. S. 568, 100 L. Ed. 705, 76 S. Ct. 629; *May v. Anderson* (1953), 345 U. S. 528, 97 L. Ed. 1221, 73

S. Ct. 840, annotation, The Doctrine of *Pennoyer v. Neff*, 94 L. Ed. 1167, 1174, supplemented in 2 L. Ed. 2d 1664, 1666.

Statutes providing for other than personal service in the state on nonresident motorists are based upon the power of the state to require a license for use of its highways, and, therefore, to require appointment of a designated state official to accept service of summons in actions growing out of use of its highways as an exchange for the privilege of using those highways. See 8 *American Jurisprudence* 2d 408, Section 849; annotation, *supra* (94 L. Ed. 1167), 1177. No such factors can afford any reasonable basis for the application in the instant case of the Illinois statute relied upon.

Hence, because it appears from the petition that the Illinois judgment against defendant, an Ohio resident, was based only upon service outside Illinois and there is no reasonable basis for recognizing the constitutional validity of such service, the Common Pleas Court should have rendered judgment for defendant. It follows that the judgment of the Court of Appeals should be affirmed, although not for the reason which it specified.

BROWN, J., concurs in the foregoing dissenting opinion.

JUDGMENT OF THE SUPREME COURT OF OHIO.

(June 27, 1966.)

Judgment of the Court of Appeals is reversed for the reasons stated in the opinion filed herein and the cause is remanded to that court for further proceedings not inconsistent with this opinion.

ORDER DENYING REHEARING.

(September 28, 1966.)

It is ordered by the court that rehearing in this case is denied.

APPENDIX B.

CONSTITUTIONAL PROVISIONS AND STATUTES.

Constitution of the United States.

Article IV, Section 1:

Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Ohio.

Article I, Section 16, Redress in courts.

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Ohio Revised Code.

§ 2311.01 Trial defined. (GC § 11376)

A trial is a judicial examination of the issues, whether of law or of fact, in an action or proceeding.

[§ 2311.04.1] § 2311.041 Summary judgment.

Summary judgment may be granted in a civil action as provided in this section.

(A) A party seeking to recover upon a cause of action or counterclaim or to obtain a declaratory judgment, or a party against whom a cause of action or counterclaim is asserted or a declaratory judgment is sought, may, at any time after the action is at issue, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. *If the action has been set for pretrial, a party may file a motion for summary judgment only with leave of the court. After the action has been set for trial such a motion may only be filed with the consent of all the parties to the action.*

(B) The hearing on a motion for a summary judgment shall not be less than ten days after the date of the filing thereof. Notice of the filing and the date of the hearing of such motion shall be given by certified or registered mail, or personally, to the opposing party or his counsel of record at least five days prior to the hearing, unless waived. The adverse party prior to the day of hearing may file opposing affidavits. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, *written* admissions of the genuineness of papers or documents, affidavits, *transcripts of evidence in the pending case, and written stipulations of fact,* if any, *previously filed in the action,* show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *No evidence or stipulation may be considered except as stated in this section.* A summary judgment shall not be rendered unless it appears from the pleadings, depositions, answers to interrogatories, *written* admissions of the genuineness

of papers or documents, affidavits, *transcripts of evidence in the pending case, and written stipulations of fact,* if any, *previously filed in the action, and only therefrom,* that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made; the party against whom the motion for summary judgment is made is entitled to have such *pleadings,* depositions, answers to interrogatories, *written* admissions of the genuineness of papers or documents, affidavits, *transcripts of evidence in the pending case, and written stipulations of fact* construed most strongly in his favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(C) If on motion under this section summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings, depositions, answers to interrogatories, *written* admissions of the genuineness of papers or documents, affidavits, *transcripts of evidence in the pending case, and written stipulations of fact, if any, previously filed in the action and only therefrom,* before it, shall if practicable ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(D) Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(E) Should it appear from the affidavits of a party opposing the motion for summary judgment that he cannot for sufficient reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

Illinois Revised Statutes, Chapter 110.

§ 16. (Civil Practice Act, § 16). Personal service outside State.

(1) Personal service of summons may be made upon any party outside the State. If upon a citizen or resident of this State or upon a person who has submitted to the jurisdiction of the courts of this State, it shall have the force and effect of personal service of summons within

this State; otherwise it shall have the force and effect of service by publication.

(2) The service of summons shall be made in like manner as service within this State, by any person over 21 years of age not a party to the action. No order of court is required. An affidavit of the server shall be filed stating the time, manner and place of service. The court may consider the affidavit, or any other competent proofs, in determining whether service has been properly made.

(3) No default shall be entered until the expiration of at least 30 days after service. A default judgment rendered on such service may be set aside only on a showing which would be timely and sufficient to set aside a default judgment rendered on personal service within this State. 1933, June 23, Laws 1933, p. 784, art. 3, § 16; 1947, July 21, Laws 1947, p. 1350, § 1; 1955, July 19, Laws 1955, p. 2238, § 1.

§ 17. (Civil Practice Act, § 17). Act submitting to jurisdiction—Process.

(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts:

(a) The transaction of any business within this State;

(b) The commission of a tortious act within this State;

(c) The ownership, use, or possession of any real estate situated in this State;

(d) Contracting to insure any person, property or risk located within this State at the time of contracting.

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this section, may be made by personally serving the summons upon the defendant outside this State, as provided in this Act, with the same force and effect as though summons had been personally served within the State.

(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

(4) Nothing herein contained limits or affects the right to serve any process in any other manner, now or hereafter provided by law. 1933, June 23, Laws 1933, p. 784, art. 3, § 17; 1955, July 19, Laws 1955, p. 2238, § 1.